Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

Comments of the American Federation of Labor and Congress of Industrial Organizations and the Department for Professional Employees, AFL-CIO

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SUMMARY

In these comments, the AFL-CIO and the Department for Professional Employees, AFL-CIO (DPE) respond to the Federal Communications Commission's call for public input into proceedings on media ownership rules established in its *2002 Biennial Review Order*, as remanded by the U.S. Court of Appeals for the Third Circuit in *Prometheus v. FCC.* In particular, they present arguments and evidence why maintaining rules ensuring diverse ownership over different media outlets remains essential for the protection of viewpoint and musical diversity in local markets and how media consolidation has hurt diversity and localism and has spawned anti-competitive business practices.

Specifically, the AFL-CIO and DPE reaffirm the following principles, expressed in comments they and other citizen petitioners filed in earlier proceedings on media consolidation, and largely acknowledged as important goals by the Commission and affirmed by the *Prometheus* Court:

- *Viewpoint diversity must remain a primary goal of the Commission's rulemaking.* The Commission has long recognized, and the courts have confirmed, that viewpoint diversity is vital to our democracy and public welfare. The promotion of viewpoint diversity should continue to be a primary goal of the Commission's media ownership policy. Maintaining diverse and antagonistic media sources is vital for ensuring that people have access to the news and information they need to participate as citizens in a democratic society.
- *Preserving and encouraging localism also should remain a primary goal in the Commission's rulemaking.* Encouraging localism has historically been a goal of Commission policies. Local program service is a vital part of community life that the Commission has sought to promote through market structures that take advantage of media companies' incentives to serve local communities.
- *The Commission should continue to maintain competition as a policy goal in its rulemaking.* The Commission also has acknowledged the principle that competitive markets best serve the public because they result in lower prices, higher output, more choices for buyers, and more technological progress. Moreover, competitive markets contribute to the related goal of viewpoint diversity.

Although diversity, localism and competition are primary policy goals, the Commission's *2002 Order* rejected the proposition that media ownership concentration significantly affects achievement of these goals, and therefore, that strong media ownership limits remained necessary. The AFL-CIO and DPE disagreed with the *2002 Order's* weakening of media consolidation rules in and across the broadcasting and newspaper sectors, but commend the

Third Circuit Court's decision to remand several rulemakings in that order, offering a new opportunity for public input into the rulemaking process.

Specifically, the AFL-CIO and DPE comments examine the important influence of media ownership and concentration on viewpoint diversity and localism. They argue that as media concentration has continued to grow since the Commission's earlier proceedings on media consolidation, media ownership limits need to be maintained and strengthened, not weakened, to protect diversity, localism and competition. They further affirm the importance of maintaining limits on media ownership concentration for preserving musical localism and diversity, and that because substitutability between media types is very limited, it is not a valid justification for weakening media ownership rules.

The evidence shows that media and news markets are highly concentrated and will become even more so if media ownership rules are relaxed. Virtually all media markets are concentrated at the national and local levels. Six media giants dominate the world of media and entertainment and the major broadcast TV networks dominate prime time, receive the bulk of national advertising dollars, and account for the overwhelming majority of high impact news and information shows. Local broadcast markets also are highly concentrated, as are newspapers, especially in local daily newspaper markets, as most metropolitan areas have only one or two daily newspapers. The radio market is similarly concentrated at every level. One company, Clear Channel, which owns over 1,200 local radio properties, increasingly dominates local radio markets. The dramatic rise in media ownership concentration is a product of the loosening of regulations, especially in the late 1990s, that spurred a wave of mergers and consolidations. Based on evidence of what happened after changes in ownership rules, it is likely that numerous mergers would occur if the Commission maintains the rules promulgated in the *2002 Order*. That shift would in turn greatly reduce the number of independent voices in the market.

There is substantial evidence and agreement that media ownership concentration reduces viewpoint diversity. It is widely accepted by the Commission and the courts—including the Third Circuit Court—and supported by ample evidence, that ownership can influence viewpoint. A larger number of independent owners will generate a wider array of viewpoints in the media than would a smaller number of owners. Growing media concentration however is having a negative impact on journalistic programming content and quality. Evidence, including studies and surveys of working journalists, as well as examples, shows increased concentration in media ownership has led to a decrease in viewpoint diversity. Media ownership consolidation influences editorial voice by eroding the wall between the business and editorial side of news sources, affecting the ability of local news stations to maintain journalistic independence. Broadcast ownership limits therefore are necessary to preserve and promote viewpoint diversity.

There is strong evidence that media ownership diminishes localism in news media. There is no dispute over the important role of media in informing citizens about local affairs. Maintaining local identity is a fundamental principle of quality journalism and responsible media. Substantial empirical and anecdotal evidence shows that consolidation hurts localism as much as diversity, by undercutting local news coverage and programming. The national media chains are governed by the dictates of mass audiences, that is, a drive to capture large market shares by catering to the lowest common denominator in programming, undercutting the ability to deliver culturally diverse, locally-oriented, and public interest programming. News and public affairs programming in particular are vulnerable to economic pressures, and tend to be reduced under growing market forces. Evidence and many examples show how media concentration puts pressure on local newspapers and broadcast stations to reduce their costs, resulting in reductions in local news coverage. The Commission therefore should not discount localism in setting media ownership limits.

Evidence shows that media ownership concentration diminishes localism and diversity in musical programming. Diversity and localism in music programming diminished because of ownership deregulation, particularly in radio markets. Broadcast stations should reflect and create opportunities for local artists and avenues for local self-expression. Localism requires stations to be programmed locally by local individuals. Market forces created by the overwhelmingly consolidated broadcast media industry fail to provide the necessary incentives to promote localism. Instead, they promote centralized, homogenized, and uniform programming that lacks local input or participation,and that diminishes access to diverse genres including jazz, classical, Tejano and other music outside of the "top 40." Two troubling practices enabled by radio ownership concentration are national or regional "playlists"—a uniform list of songs played on local radio stations mandated by station group owners—and "voice-tracking"—a technology used by Clear Channel which replaces live and local broadcasts with pre-recorded airshifts in remote locations. Both practices erode local control over musical formats and programming, eliminating traditional avenues by which local radio stations and disc jockeys foster local artist development and the growth of unique local music genres. The continued erosion of local musical media markets resulting from consolidation therefore diminishes the richness of American musical culture.

Substitutability has been shown to be very limited between media types (television, radio, newspaper, cable, Internet), and not a valid justification for weakening media ownership rules. Proponents of weakening media ownership restrictions argue that different media news sources are substitutable, and because of a proliferation of media outlets restrictions that limit ownership of media outlets can be relaxed without damaging viewpoint diversity, localism and competition. The Commission's *2002 Order* largely accepted this argument. The *Prometheus* Court, however, disagreed on this point, especially regarding the Internet, which contributes to viewpoint diversity in an entirely different way than media outlets. The Court also criticized the Commission's attempt to justify different treatment for the cable and the Internet. The Court noted that even the Commission acknowledged that almost 30 percent of Americans lack Internet access. The Internet along with cable therefore should be discounted as independent news sources in setting media ownership limits. In the Commission's measurement of viewpoint diversity, substitutability between media type, including substitution of Internet or cable for traditional news sources, should no longer be a consideration.

These comments review five of the six rules remanded by the *Prometheus* Court and being considered by the Commission for new rulemakings, and demonstrate why maintaining these rules continues to be an essential tool for ensuring diversity, localism and competition in local and national media markets. Based on this review, the AFL-CIO and the DPE strongly urge the Commission to strengthen and maintain the remaining broadcast ownership rules.

- *The Commission should retain or tighten the current local television ownership limit to preserve diversity and localism in the delivery of news.* There are many examples of how media consolidation has caused the loss of newscasts or the sharing of news products among media properties in local markets. Local decision-making and control over news gathering and reporting are taken away when local stations are acquired by media conglomerates. Evidence also shows that media companies who purchase local media sources exert control over news decisions in local markets.
- *The Commission should maintain and strengthen the current local radio ownership caps in order to preserve, protect and promote news as well as diversity and localism in musical programming.* Elimination of the national radio ownership cap and loosening of the local radio station ownership limits have resulted in massive consolidation of radio properties nationwide, and a slowing in the rate of growth of stations in local markets. Evidence shows that consolidation in local radio markets can hurt news diversity, localism and quality just as it can in television markets or in cross-ownership between TV and newspapers and TV-radio. Consolidation of radio ownership since the 1996 Telecommunications Act has diminished musical diversity and localism by encouraging practices such as playlists and voice-tracking. Studies demonstrate that the

massive consolidation in the radio industry over the past six years has resulted in a sharp *decrease* in the diversity of music available in local communities. Media consolidation also has created conditions that enable if not encourages questionable practices, such as pay-for-play and payola. Further slackening of the regulatory controls in the radio industry would violate the Commission's duty and mandate to protect the public interest.

- *The Commission should retain and strengthen limits on broadcast-newspaper cross-ownership and TV-radio cross-ownership, whether they are treated as separate rules or a combined media cross-ownership rule.* Preserving the prohibition against the common ownership of newspapers and television stations (and TV and radio) in local markets is critical for maintaining diversity in the delivery of local news and programming to the public, because of the uniquely important role these media sources play in the delivery of news to the public, and because there are already few voices in local markets for these outlets. The monopoly daily newspaper and a handful of television stations dominate the local media market. Most Americans have access to only three or four broadcast television newscasts. Permitting the co-ownership of newspapers and broadcast stations would encourage even fewer voices. The Commission's new rulemaking on cross-ownership limits applied to broad-cast/newspaper and TV-radio combinations, therefore, should be more restrictive and based on more logical, reasonable measures than in the *2002 Order*. Specifically:
    - The Commission should preserve the current bans on media cross-ownership which allow waivers on a case-by-case basis;
    - If the Commission wants to establish a single cross-media rule, it should apply the methodology outlined by *Prometheus* Court. That is, it should:
        - assign an appropriate weight for consumer use of each media for local news and information (e.g. daily and weekly newspapers, TV, radio), and then weight each media within its media type by market share (e.g. distinguishing the market shares of New York Times and the New York Daily News); and,
        - use the Department of Justice/Federal Trade Commission Hirshman Herfindahl Index (HHI) to evaluate mergers. In a "concentrated market" (HHI greater than 1000 and less than 1800), a change of 100 points should not be allowed and no mergers should be allowed in markets with a HHI greater than 1800.
    - Waivers should be allowed on the condition that the rule requires separate news operations if a cross-media merger is permitted.

- *The Commission should retain the dual network rule to protect against the erosion of local news and to revitalize and encourage innovation in entertainment programming.* The weakening of the dual network rule has permitted increases in the number and scale of network mergers between major media networks, resulting in less diversity of news programming. The loss of independent producers resulting from the vertical integration of the broadcast networks has resulted in less diversity and innovation in entertainment programming. Ownership consolidation of television stations, both horizontally and vertically across the industry, not only has damaged the quality of news programming, but has stifled innovation and diversity in entertainment, another critically important forum for nurturing and promoting American culture and democracy. The Commission, therefore, should not permit even greater ownership consolidation by further weakening or eliminating the dual network rule.
- *The Commission's media ownership rules should be designed to preserve, protect and promote minority ownership of media properties.* The Commission has affirmed minority and female diversity as a policy goal, but was criticized by the Third Circuit Court for repealing the Failed Station Solicitation Rule in the *2002 Order*, its only policy aimed at fostering minority television station ownership. Minority broadcast ownership has been called "abysmal," as minorities reportedly own only 1.2% of equity in the broadcast industry. Minority-ownership of radio and television properties is extremely low, and in television it has fallen in the three years since deregulation of local television station ownership. Discrimination and media consolidation are primary factors impeding minority media ownership. Consolidation amplifies the impact of discrimination and it has contributed to declining minority television ownership in the radio and television industries. As the loosening of each type of media ownership rule would further threaten minority ownership, the Commission's rulemakings need to ensure that any new ownership limits preserve, protect and promote minority ownership. It also should adopt proposals of the Minority Media and Telecommunications Council (MMTC), outlined in 2003 comments filed with the FCC, which address barriers that impede minority ownership and foster greater minority ownership in the future.

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I. INTRODUCTION

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Department for Professional Employees, AFL-CIO (DPE) file these comments in response to the Federal Communications Commission *Further Notice of Proposed Rule Making* (*FNPRM*) released July 24, 2006. The *FNPRM* asks for public input on how to address the issues raised by the opinion of the U.S. Court of Appeals for the Third Circuit in *Prometheus v. FCC*[1] and whether the media ownership rules are "necessary in the public interest as the result of competition." On June 2, 2003, the Commission adopted a Report and Order in its third biennial review of its broadcast ownership rules (i.e., the "*2002 Biennial Review Order*," referred to here as the "*2002 Order*").[2] The *2002 Biennial Review Order* addressed all six of the Commission's broadcast ownership rules: the national television multiple ownership rule, the local television multiple ownership rule, the radio/television cross-ownership rule, the dual network rule, the local radio ownership rule, and the newspaper/broadcast cross-ownership rule. In *Prometheus*, the Third Circuit Court affirmed some of the Commission's decisions in that order, but remanded several others for

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1 *Prometheus Radio Project, et al. v. Federal Communications Commission,* 373 F.3rd 372 (2004) ("*Prometheus*")

2 *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other*
Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13711-47(2003) ("*2002 Order*").

further Commission justification or modification. The AFL-CIO and the DPE welcomed the Third Circuit Court's decision, which sets aside Commission rulings that had substantially weakened media ownership rules vital for protecting against the erosion of diversity, localism, competition and quality in the nation's news media.

The AFL-CIO is a federation of 53 national and international unions representing nearly nine million working women and men nationwide and another one million members of the AFL-CIO affiliate Working America. The Department for Professional Employees, AFL-CIO (DPE) represents 23 national AFL-CIO unions that include professional, technical, and other highly skilled white-collar workers in their bargaining units as well as musicians and vocalists who create sound recordings and soundtracks. These DPE unions collectively represent over 4 million union households, with nearly 10 million television viewers in them who are consumers of news and entertainment programming. Among the DPE unions are 11 with nearly one-half million media professionals, artists, technicians and support workers who are involved in all phases of news and entertainment programming and artistic creation. In the past, DPE and these unions have worked with the Federal Communications Commission on a range of communications issues including media ownership.

The women and men represented by the AFL-CIO, the DPE, and their affiliated unions depend upon diverse and often mutually antagonistic media sources to provide the news and information needed to participate as citizens in a democratic society. The half million professional, artistic and technical workers represented by AFL-CIO and DPE affiliated unions in the news and entertainment industries work hard every day to provide their local communities with news and information from the widest possible array of diverse sources and to create works of art that expand American culture. But all too often they face powerful constraints as they go about their work—constraints imposed by the business objectives of the large media conglomerates, newspaper chains, and corporations who own the media outlets where they work or that provide outlets for their artistic creations. These constraints have multiplied in recent years as large and distant media corporations have taken over local newspapers and radio and television stations, imposing profit goals that can only be met by large cuts in news budgets, reduced local news coverage and restriction of music formats and programming. Working journalists, recording artists, and other media employees know from daily experience that media ownership influences the diversity of music as well as the content, depth, and quality of the news and information they are able to publish and air over the public airwaves.

In today's already highly concentrated media marketplace, therefore, strong media ownership rules are all the more essential to ensure the robust competition and ownership and programming diversity vital to the economic health and viability of the media and entertainment sectors. In the news and information business, competition and diversity help preserve localism in news coverage, enhance the quality and comprehensiveness of news content, assure a multiplicity of voices from a variety of independent sources and reduce the risk that news will be censored or slanted by a few controlling interests. Maintaining competition and diversity is central to protecting the public's right to information and, importantly, to expanding the public's informed participation in our democracy. In the entertainment sector, competition and diversity stimulate the kinds of creativity and variety in programming that the American public has come to expect but that has been significantly diminishing over time. For these and related reasons discussed in these comments below, the AFL-CIO and the DPE urge the Commission, in its reconsideration of the media ownership rules remanded by the Third Circuit Court, to maintain and strengthen the current media ownership restrictions—rather than weaken them as it had in its *2002 Order*.

In these comments, the AFL-CIO and the DPE will address a number of questions raised by the Commission in its *FNPRM*, in particular, why maintaining rules that ensure diverse ownership over different media outlets remains essential for the protection of viewpoint diversity in local markets and how media consolidation has hurt diversity and localism and has spawned anti-competitive business practices. In particular, the AFL-CIO, joined by the DPE, reaffirms the same views and principles the AFL-CIO expressed in its 2003 comments[3] about the importance of limiting consolidation of media ownership to preserve localism, diversity and competition in media markets. Moreover, the arguments the AFL-CIO presented, which it had backed by substantial evidence reviewed in those comments, were in substantial agreement with those presented in separate comments filed by affiliated news and entertainment unions, as well as a number of citizen organizations who also filed comments in the previous proceedings. Indeed, these positions are in substantial accord with the arguments employed by the Third Circuit in rejecting and remanding many of the Commission's rulings in the *2002 Order*. The Commission itself, as repeatedly pointed out in the various comments, and reaffirmed by the Third Circuit Court accepts diversity, localism and competition as primary goals for its public policies and rulemakings. Specifically, the AFL-CIO and the DPE reaffirm the following principles:

♦ ***Viewpoint diversity must remain a primary goal of the Commission's rulemaking.*** The Commission has long recognized, and the courts have confirmed, that viewpoint diversity is vital to our democracy and public welfare. As the Supreme Court concluded in *Associated Press v United States*, 326 U.S. 1, 20 (1945) viewpoint diversity in our media is

[3] Comments of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) et al, *In the Matter of 2002—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets,* MB Docket No. 02-227; MM Dockets Nos. 01-235, 01-317, 00-244. Filed with the FCC January 2, 2003. (*"AFL-CIO 2003 Comments"*)

important because "[i]t advances the values of the First Amendment," and rests on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[4] Thus, "promoting the widespread dissemination of information from a multiplicity of sources is a government interest that is not only important, but is of the 'highest order' and is unrelated to the suppression of free speech."[5] Similarly, as noted by the Third Circuit Court in *Prometheus*, the Supreme Court in *NCCB v. FCC* "endorsed a substantial government interest in promoting diversified mass communications."[6]

♦ ***Preserving and encouraging localism also should remain a primary goal in the Commission's rulemaking.*** The Commission itself has affirmed that it historically pursued policies aimed at encouraging localism. From the earliest days of broadcasting, it asserts, "federal regulation has sought to foster the provision of programming that meets local communities' needs and interests." It notes that one statutory basis of its promotion of localism in broadcasting is Section 307 of the 1934 Act, which dates from the Radio Act of 1927. The Congressional Findings and Policy in connection with the Cable Television Consumer Protection and Competition

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[4] Federal Communications Commission, *Notice of Proposed Rulemaking*, *In the Matter of 2002—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets,* MB Docket No. 02-227; MM Dockets Nos. 01-235, 01-317, 00-244. Released September 23, 2002, ¶35 (citing *Turner Broadcasting System, Inc. v. FCC*, 51 U.S. 622, 663-64 (1994)). *("NPRM 2002").*

[5] *Id.,* ¶22 (citing *Turner*, 512 U.S. 622, 662-63).

[6] *FCC v. National Citizens Comm. For Broadcasting.*, 436 U.S. 775, 780 (1978) at 795,805 *("NCCB").* In *Prometheus,* 57.

Act of 1992, also support this position. They include the finding that "[a] primary objective and benefit of our nation's system of regulation of broadcast television is the local origination of programming."[7] Similarly, in his partly dissenting and partly concurring statement in *Prometheus*, Third Circuit Court Chief Judge Scirica notes the significant emphasis Federal regulation of broadcasting historically has placed on the policy goal of localism. He elaborates, writing that, "localism addresses whether broadcast stations are responsive to the needs of their local communities."[8] Both congressional directives to the Commission and the courts have affirmed localism as a valid regulatory objective. Citing *NBC v. United States,* he quotes: "Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community."[9] He further observes that the Commission sought to promote localism through market structures that take advantage of media companies' incentives to serve local communities. In order to measure localism, moreover, the Commission emphasized "the selection of programming responsive to local needs and interests, and local news quantity and quality."[10]

♦ *The Commission should continue to maintain competition as a policy goal in its rulemaking.* In its *NPRM* for the proceedings that led to its *2002 Order*, the Commission stated that it has "relied on the principle

[7] *NPRM 2002* ¶69
[8] *Prometheus,* 149.
[9] *2002 Order* ¶74; *NBC v. United States*, 319 U.S. 190, 203 (1943). In *Prometheus,* 149.
[10] *2002 Order* ¶ 78-79, in Prometheus, 149.

that competitive markets best serve the public because such markets generally result in lower prices, higher output, more choices for buyers, and more technological progress than markets that are less competitive." In general, "the intensity of competition in a given market is directly related to the number of independent firms that compete for the patronage of consumers."[11] The Commission has also been concerned with the competition issue as it pertains to the advertising market.[12] Towards that end, the Commission sponsored studies to evaluate the relationship between consumption of broadcast material and broadcasting time devoted to advertising in the context of increasing ownership concentration.

Third Circuit Court Chief Judge Scirica affirmed in *Prometheus* that the *2002 Order* reaffirmed the Commission's "longstanding commitment to promoting competition by ensuring pro-competitive market structures," in that competitive markets provide consumers more choice, lower prices, and more innovative products and services than in markets where one or more firms exercise market power. Moreover, he observes that the Commission recognized that competitive markets contributed to the related goal of viewpoint diversity.[13]

Although the Commission appears to accept that diversity, localism and competition are primary policy goals, in its *2002 Order* it largely rejected the proposition that the concentration of media ownership has a direct and

[11] *NPRM 2002* ¶52.
[12] *2002 Order* ¶59.
[13] *Id.,* 58. In *Prometheus* 147-148.

significant impact on the achievement of these goals, and therefore, that strong media ownership limits remained necessary. The AFL-CIO disagreed with the FCC's rulemakings in the 2002 order that substantially weakened media consolidation rules in and across the broadcasting and newspaper sectors. The AFL-CIO and the DPE therefore commend the Third Circuit Court's decision to remand several of the Commission's rulemakings in the order, offering a new opportunity for public input into the rulemaking process.

In the next section, the AFL-CIO and the DPE reaffirm the position argued in the earlier AFL-CIO comments that media ownership matters in maintaining the principles of diversity, localism and competition.

The last section reviews five of the six rules the Third Circuit Court remanded for reconsideration by the FCC, and argues and presents empirical evidence about the need to preserve or strengthen the media ownership limits in the current rules. It also reviews the impact of media ownership concentration on minority ownership in broadcasting, and why media consolidation limits remain critical for preserving, protecting and promoting minority ownership of media properties.

II. PRESERVING MEDIA OWNERSHIP LIMITS

The following discussion examines the important influence of media ownership and concentration on viewpoint diversity and localism. It argues that as media concentration has continued to grow since the Commission's earlier proceedings on media consolidation, media ownership limits need to be strengthened, not weakened, to protect diversity, localism and competition. It further affirms the related, important principle that media ownership limits are important for preserving and promoting diversity of musical programming. Finally, it affirms a position the Third Circuit has indicated agreement with, that substitutability between media types is very limited, and therefore should not be used to justify decisions to relax media ownership rules.

♦ ***Media and news markets are highly concentrated and will become even more so if media ownership rules are relaxed.*** Virtually all media markets are concentrated at the national and local levels. Today, seven media giants—Viacom, CBS Corporation, Time Warner, NBC Universal, Sony, Fox and Disney—rule the world of media and entertainment. Among them they own all five broadcast networks—NBC, CBS, ABC, Fox, and The CW Television Network (formerly UPN and WB)—and sixty-four cable networks. Between broadcast and cable networks, they control over 96 percent of the programs that carry commercial advertising during prime time. They also control the networks aimed at children under twelve—including Disney Channel, Nickelodeon, Nick at Nite, the Cartoon Network, the ABC Family Network, and Fox Kids—and young teens, including MTV, Fox Sports, and ESPN. The big seven also dominate the worldwide distribution of movies.[14]

In his study on media ownership, Consumer Federation of America research director Mark Cooper notes that the major broadcast TV networks dominate prime time, the most valuable television viewing time, and receive the bulk of national advertising dollars. The big three networks account for the overwhelming majority of high impact news and information shows—80-90 percent—and if Fox, which was built on stations that already did news, is added in the share is well above 90 percent.[15] Elsewhere, in response to the Commission observation that the top four broadcast networks have ownership interest in only 25 percent of the 102 broadcast channels, Cooper notes that the big networks have guaranteed access to "that distribution and close interconnection through stock ownership and joint ventures to the cable companies that control the remainder of the channels." Thus, he concludes, "the joint activities of this cabal has resulted in a video programming market that is a tight oligopoly by all traditional measures of market structure."[16]

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[14] Edward Jay Epstein, *The Big Picture*, New York: Random House (2005), 82-84, www.viacom.com/separation_overview.jhtml (October 23, 2006).

[15] Mark Cooper, *Media Ownership and Democracy in the Digital Information Age,* Center for Internet & Society, Stanford Law School, Stanford, California (2004), 132.

[16] "Petition for Reconsideration Consumer Federation of America and Consumers Union" (CFA/CU Petition 2003), *Before the Federal Communications Commission, In the Matter of 2002 Biennial Regulatory Review—Review of Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* and *Definition of Radio Markets,* MB Docket No. 02-277, MM Dockets Nos. 01-235, 01-317, and 00-244, Washington, DC, September 4, 2003, 7.

Network broadcast TV is predominantly national, and accounts for almost 60 percent of all national advertising revenues. Local broadcast markets also are highly concentrated. Cooper calculates that using Designated Market Areas (DMAs) to define the geographic markets—despite the fact that this often leads to underestimation of concentration levels—out of 210 local TV markets, none are unconcentrated, only eight percent are moderately concentrated, half are tight oligopolies and a quarter are duopolies. Local news broadcasting is also highly concentrated—in 70 percent of the markets, original local news is available from only four (or fewer) broadcasters. Cooper reports, if we include stations that do not produce original local news but air news content produced by someone else, in 62 percent of the markets there are four or fewer stations airing local news.[17]

Newspaper markets are even more concentrated than TV markets, and local daily newspaper markets are highly concentrated. Most major metropolitan areas have only one or two daily newspapers covering local news of the entire metropolitan area. Many readers can supplement their major daily paper with a suburban weekly. Based on his assessment of 68 large newspaper markets Cooper determined that well over half are monopolies, one fifth are duopolies, one-fifth are tight oligopolies, and none are unconcentrated. Almost 40 percent smaller markets are monopolies, and another 40 percent are duopolies—in both instances, the percentages greater than for larger markets. For all newspaper markets, large and small Cooper

[17] Cooper, *Media Ownership* (2004), 135.

calculates that well over two-thirds are monopolies, another quarter are duopolies, and the final one-tenth are tight oligopolies.[18]

The radio market is also concentrated at every level. Cooper observes that, "[e]ven at the national level, where one might think that the existence of a market fragmented into 285 geographic areas and populated by over 10,000 stations would limit the possibility of concentration," he found that "the market is moderately concentrated when measured by listeners and revenues." If national markets are viewed from the perspective of product types or formats, he adds, there is a "startling level of concentration." All radio formats are at least loose oligopolies (the top four firms control greater than 40 percent of the market), and the majority have become tight oligopolies. And on a listener-weighted basis, the average format is a tight oligopoly. Radio markets are primarily local, and Cooper found that at this level, concentration is even greater. He calculated that half of all local radio markets are effectively duopolies and almost ten percent are monopolies.[19]

One large media company, Clear Channel Communications, Inc, in particular, increasingly dominates local radio markets. Clear Channel is one of America's top ten international media conglomerates with gross revenues of $8.4 billion in 2002. Clear Channel owns over 1,200 radio stations across the country, over five times the number of stations owned by its closest competitor, Cumulus, which owned 260 in 2002. Other top owners of local

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[18] *Id.,* 157-158.
[19] *Id.,* 163.

radio stations include Citadel (206), CBS Radio (185), and Entercom (103). Alone, Clear Channel controls 20 percent of all radio industry revenues, and 11 percent of all stations. In 37 of the top 300 markets, Clear Channel's revenue share ranges between 50 and 99 percent.[20]

It is clear from the evidence, that although consolidation among media companies has been going on for decades, the loosening of regulations—relaxation of the TV duopoly rule in the late 1990s, deregulation of cable in the 1980s and 1990s, the elimination of national radio ownership limits in the Telecommunications Act of 1996, and the repeal of the Financial and Syndication Rules in the early 1990s—spurred a wave of mergers and consolidations. Given this history, and the seeming natural propensity of media companies to merger, any further loosening of the media ownership rules will lead to far more concentration.

For example, in recent testimony before the FCC in Los Angeles, Cooper reported that less than a decade after the repeal of the Financial and Syndication Rules, the broadcasters went from owning about one-fifth of the shows in prime time to four-fifths.[21] Newspaper ownership has rapidly consolidated as well. Gannett, after a multibillion-dollar spate of acquisitions in 2000, has grown from 74 to 99 daily newspapers. Gannett now produces one out

[20] Maria Figueroa, Damone Richardson, and Pam Whitefield, "The Clear Picture on Clear Channel Communications, Inc., A Corporate Profile," Report for the American Federation of Labor-Congress of Industrial Organizations, Cornell University, January 28, 2004.
[21] Mark Cooper, "The Impact of Lifting the Newspaper-TV Cross-Ownership Ban on Los Angeles Media Markets," Statement on behalf of Consumer Federation of America, Consumers Union, Free Press and The Media and Democracy Coalition, Before the Federal Communications Commission, Public Hearing On Media Ownership, Los Angeles, California, October 3, 2006.

of every seven newspapers sold in the United States.[22] Radio consolidation dramatically escalated after the Telecommunications Act, which allowed larger markets to become much more concentrated, increasing from being tight oligopolies to very tight oligopolies, according to Cooper. In less than a decade after the lifting of the national cap on radio, the top four firms went from owning about 160 to owning over 2,000. In less than a decade after the relaxation of the duopoly rule, over 75 duopolies were created, according to Cooper.[23] Clear Channel led the way absorbing large numbers of local radio stations around the country, growing from just 43 stations just before the 1996 Telecommunications Act was passed to 1,239 today.[24]

Despite the obvious trend towards consolidation, proponents of weakening the media ownership rules point to the growth of media outlets, especially in TV broadcast and radio. For example, the number of full power TV stations increased from 952 to 1,678 between 1975 and 2000, and the number of radio outlets shot up from 7,785 to 12,932. (On the other hand newspapers declined from 1,756 to 1,422.) In their outlet counts, they also largely point to the increase in Internet, cable, and satellite. However, the FCC in the *2002 Order* correctly discounted cable, since it does little in local news. Moreover, the *Prometheus* decision correctly discounted Internet as largely a new platform for repurposing the news. Most significantly, though, despite the growth in TV and radio stations, there was a sharp decline in the

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[22] Kunkel, Thomas and Gene Roberts, "Leaving Readers Behind: The Age of Corporate Newspapering." Vol. 23 No. 4 *American Journalism Review* (May 1, 2001).
[23] Cooper, *Media Ownership* (2004), 163.
[24] Maria Figueroa, Damone Richardson, and Pam Whitefield (2004).

number of owners. Today, there are one-third fewer broadcast owners than there were 25 years ago. The number of owners of TV stations shrunk from 543 in 1975 to 360 in 2000, the number of radio station owners dropped from 5,100 to 3,800, and the number of newspaper owners fell dramatically from 863 to 290, over the same period.[25]

Of even greater concern, for purposes of these comments, is the comparable decline in the number of newsrooms in each media type. The number of television newsrooms dropped by one-tenth, from 940 to 850 over the 25-year period, while newspaper newsrooms declined by 30 percent, from 1,756 to 1,422 from 1975 to 2000, and radio newsrooms fell by one-quarter, from approximately 6000 to 4,500.[26]

Based on this evidence, these comments can only strongly concur in Cooper's assessment that based on what happened after changes in other ownership rules, several hundred mergers are likely to occur if the Commission maintains the rules promulgated in the *2002 Order*, greatly reducing the number of major independent voices in the market. As Cooper succinctly states, "Starting from the initial base of highly concentrated markets, eliminating or relaxing ownership limits would have a devastating impact on media concentration."[27]

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[25] Cooper, *Media Ownership* (2004), 134, Table VI-2.
[26] *Id.,* 134, Table VI-2.
[27] *Id.,* 131.

♦ *Media ownership concentration reduces viewpoint diversity.*

There is substantial agreement and ample evidence that media ownership influences viewpoint diversity, as was presented in the AFL-CIO's earlier comments, as well as in the comments of other labor and public interest commentators in the 2003 media consolidation proceedings. In its 2003 comments the AFL-CIO noted that the Commission in its *NPRM* has recognized and the courts have confirmed that ownership limits are a rational and appropriate manner of promoting viewpoint diversity as "the greater the diversity of ownership in a particular area, the less chance that there is a single person or group that can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[28] Similarly, the Commission itself correctly concluded in its *2002 Order*, "outlet ownership can be presumed to affect the viewpoints expressed on the outlet. We continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners."[29]

The Third Circuit Court in *Prometheus* also concurred, noting that the Supreme Court held in *NCCB* that the Commission had "acted rationally in finding that diversification of ownership would enhance the possibility of

[28] *NPRM* ¶14.
[29] *2002 Order* ¶27.

achieving greater diversity of viewpoints."[30] It further noted that in its *2002 Order* the Commission "justified its continued restrictions on common ownership of newspapers and broadcast stations as promoting the public interests in viewpoint diversity,"[31] and in *NCCB* the Court "has said that limiting common ownership is a reasonable means of promoting the public interest in viewpoint diversity."[32] Therefore, applying *NCCB*, the Third Circuit Court held "that the Commission's continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either."[33]

The Third Circuit also affirmed that there was ample evidence to support the Commission's conclusion that ownership can influence viewpoint. It cites several comments of what it calls "Citizen Petitioners" that provide such evidence.[34] Similarly, the Communications Workers of America (CWA) presented additional evidence in its comments to the FCC in the media consolidation proceedings. CWA asked its members who are journalists, writers, editors, and producers of news and information programming to

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[30] *NCCB* at 796. Cited in *Prometheus,* 57.
[31] *Id.*
[32] *Id.*
[33] *Prometheus,* 57.
[34] See *2002 Order* ¶¶ 24–25; Comments of the UCC et al., MB Docket No. 02-277 at 4 (Jan. 2, 2003) ("UCC Comments") (citing a Pew Research Center study of television journalists and executives that found nearly one quarter of journalists purposefully avoid newsworthy stories and nearly as many soften the tone of stories to benefit the interest of their news organizations); *Id.* at 5 (citing a 2002 study finding that outlets included more references to their own products and services and treated those items more favorably than others, thus exhibiting a "synergy bias"); Comments of Consumer Federation of America, MB Docket 02-277 at 41 (Jan. 2, 2003) (citing a 2002 study finding that election information on news pages was slanted in favor of candidate endorsed on the editorial page); *Id.* at 44 (citing a 2001 survey of news directors finding that media owners and sponsors pressure reporters to slant the news). Cited in *Prometheus*, 53, n.26.

respond to the view that "ownership doesn't affect content." It then presented four stories that it considered "typical examples of how owners' priorities shape the way they cover stories," but emphasized that these were not isolated examples. It also cited Ben Bagdikian, a nationally known journalist and media critic, who notes that most intervention by owners "is subtle, some not even occurring at a conscious level, as when subordinates learn by habit to conform to owners' ideas."[35] That is, editors and journalists in local markets tend to practice various degrees of self-censorship in the way they choose sources, write or edit their stories, or make editorial commentary.[36] Bagdikian concludes:

> "Every year there is a 'distressing list' of reporters and editors of newspapers and magazines who are fired or demoted because they stumbled on the private politics of the owners, or a list of television producers and writers who make professionally competent decisions that run counter to the politics of the corporation. Even when such firings and demotions are clear interventions of corporate politics into the editorial process, the worst damage is not in one particular incident but in the long-standing aftermath in which working professionals at the editorial level

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[35] Ben H. Bagdikian, *The Media Monopoly,* Boston: Beacon Press, 6th edition (2000), 36-37. Cited in , Comments of Communications Workers of America, The Newspaper Guild/CWA, National Association of Broadcast Employees and Technicians/CWA, Printing, Publishing, and Media Workers Section/CWA, *In the Matter of 2002 Biennial Regulatory Review— Review of Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* and *Definition of Radio Markets,* MB Docket No. 02-277, MM Dockets Nos. 01-235, 01-317, and 00-244. Filed with the FCC January 3, 2003, 29. ("CWA 2003 Comments").

[36] CWA 2003 Comments, 29

behave as though under orders from above, although no explicit orders have been given."[37]

CWA cites academic studies that offer further documentation. For example, Professor C. Edwin Baker, formerly at Harvard's Shorenstein Center, reviewed academic literature on the impact of newspaper chain ownership on content, profit orientation, and news quality. In one study he found that after Southern Press purchased Canadian Windsor Star, the Star greatly increased its reliance on the chain's news service for its front-page leads, resulting in greater uniformity in news in the chain's newspapers. In a study of Gannett newspapers, he found they were more likely to take editorial positions and were much more homogeneous in the positions they took compared to non-chain papers.[38] A Pew Research Center Survey of journalists reported that almost half (48 percent) of all local news staff, and a majority of African-American journalists, believe corporate executives exert either a fair amount or a great deal of influence over news content.[39]

Finally, in a Commission-sponsored study, George Williams, Keith Brown, and Peter Alexander suggest that increased concentration in the radio industry may have led to a decrease in diversity. Williams et al find

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[37] Bagdikian, 36-37. Cited in CWA 2003 Comments, 30

[38] Dean Alger, *Megamedia*, Lanham, MD: Rowman & Littlefield Publishers, Inc., (1998), 180-181. Cited in CWA 2003 Comments, 30.

[39] Pew Research Center for The People & The Press, *Striking the Balance: Audience Interests, Business Pressures and Journalists' Values,* nd. 21. In CWA 2003 Comments, 30.

that since 1996 there has been some decrease in songs across markets.[40] Dr. Dean Baker, in his review on behalf of the DPE of the FCC-sponsored studies for the media consolidation proceeding, notes that this finding is particularly striking, because its "methodology probably biased against finding this result." Since the FCC study examines only the top ten play lists, the study does not pick up any change in music play lists of the vast majority of songs played by radio stations.[41]

♦ *Media ownership concentration diminishes localism in news media.* Although the Third Circuit Court remanded the Commission's rulemaking on cross-media ownership limits on the basis of diversity concerns, it accepted the Commission's arguments on localism, that examination of grandfathered broadcast-newspaper cross-ownership cases showed that local news content was qualitatively and quantitatively better compared to non-cross-owned newspaper or television news coverage. The AFL-CIO and the DPE are troubled by this conclusion, though they are pleased with the remand on diversity grounds.

There is no dispute over the important role of media in informing citizens about local affairs. The AFL-CIO and the DPE therefore are concerned that the Commission may discount the principle of localism in the

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[40] George Williams, Keith Brown, and Peter Alexander, "Radio Market Structure and Music Diversity," FCC Media Ownership Working Group Study (MOWG) #9, "Radio Market Structure and Music Diversity, Sept. 2002. Cited in CWA 2003 Comments, 19.

[41] Dean Baker, *Democracy Unhinged: More Media Concentration Means Less Public Discourse: A Critique of the FCC Studies on Media Ownership,* Department for Professional Employees, AFL-CIO 2002, 18-19. Cited in CWA 2003 Comments, 19.

Commission's deliberations regarding cross-media as well as within media ownership limits. The evidence is strong that localism suffers as a result of consolidation as much as diversity, which appears to run counter to the conclusions of a Commission-based FCC-sponsored study[42] and the Third Circuit Court, that drew upon these same studies in its assessment.

The national media chains are governed by the dictates of mass audiences, that is, a drive to capture large market shares by catering to the lowest common denominator in programming, which undercuts the ability to deliver culturally diverse, locally-oriented, and public interest programming. News and public affairs programming in particular are vulnerable to economic pressures, and tend to be reduced under growing market forces. Typical types of coverage that tend to disappear under such pressures include information about schools, localized government affairs, and other community-strengthening material that enables people to live more secure and educated lives.

The AFL-CIO's 2003 comments to the Commission on newspaper/broadcast cross-ownership,[43] and the various comments from

[42] For example, see Thomas C. Spavins et al., "The Measurement of Local Television News and Public Affairs Programs," FCC MOWG Study #7, Sept. 2002. Cited in *Prometheus*, 49.

[43] Comments of the American Federation of Labor and Congress of Industrial Organizations, *In the Matter of Cross Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket No. 01-235, MM Docket No. 96-197. Filed with the FCC December 4, 2001. ("AFL-CIO 2001 Comments"); Reply Comments of the American Federation of Labor and Congress of Industrial Organizations, *In the Matter of Cross Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership*

consumer and other citizen petitioners, provided to the Commission a great deal of evidence and many examples of how media concentration puts pressure on local newspapers and broadcast stations to reduce their costs and increase their pressures, resulting in reductions in local news coverage. For example corporate owners increasingly are pressuring their local TV stations to improve their profit margins, which are largely dependent on maintaining advertising revenues. Local TV news directors are pressured to tailor their news programming to satisfy large local advertisers. These pressures can affect the ability of local news stations to maintain their journalistic independence.

The AFL-CIO comments noted that the impacts of these pressures to meet super-high profit margins on print and broadcast news and information programming—most notably editors being forced to cut staff and local news—are well-documented.[44] For example, it noted that in Asbury Park, NJ, Des Moines, IA, Louisville, KY, Long Beach, CA, and in numerous communities across the United States, editors have been forced to cut local reporting to meet tight profit margins after newspaper chains bought local newspapers.[45]

Waiver Policy, MM Docket No. 01-235, MM Docket No. 96-197. Filed with FCC February 15, 2002. ("AFL-CIO 2002 Reply").

[44] Leonard Downie Jr. and Robert G. Kaiser, *The News about the News: American Journalism in Peril*, New York: Alfred A. Knopf (2002) 78-79 and 174-5.

[45] For example, when Gannett purchased the *Asbury Park Press*, New Jersey's second-largest paper, in 1997, the newly appointed publisher slashed the newsroom staff from 240 to 185. The *Press*, once considered one of the most enterprising independent papers in the nation, experienced an exodus of its most talented people, shortened stories, de-emphasized government news and more trivialized local news, See Kunkel and Roberts (2001). Similarly, a *Columbia Journalism Review* study of the decline in news quality after Gannett takeovers of the *Des Moines Register* and the *Louisville Courier-Journal* found that at both papers,

More recently, the *Los Angeles Times*, the nation's fourth-largest newspaper, was pressured by its owner, the Chicago-based *Tribune Company*, to make additional newsroom cutbacks, on top of 90 cuts made in 2005, even though the newspaper has a relatively high profit margin of 20 percent. The Tribune purchased the Times and other properties in 2000. The layoffs have been strongly resisted all the way up to Times editor Dean Baquet and publisher Jeffrey M. Johnson who refused to make the cuts. The resistance led to the sacking of Johnson, though Baquet still holds onto his job for the time being. Some have criticized the Tribune for its "cost center" mentality. One executive reportedly echoed a common complaint about the Tribune, that the only thing he hears about "is cost cutting and nothing about expanding the business." Many Times employees express concern "that the paper cannot meet its obligations to cover the world, nation and a complex region with substantially fewer reporters and editors."[46] The sale of the

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after the initial years of the chain's ownership, the new leadership severed the last major links to family ownership and required greater obedience to the parent corporation. The *Courier-Journal,* which had a history of quality before being absorbed by Gannett, had five fewer general-assignment reporters in late 1997 than in 1990. Some of the papers' employees in interviews complained of Gannett's "revolving-door system of executive advancement," whereby editors, chief editors and publishers are frequently transferred to other papers in the chain, making it difficult to stay anywhere long enough to understand the communities they are in or develop a loyalty or affection for them. When editors or publishers do not understand an area and are not generally involved in or committed to it, they cannot provide the news leadership the community deserves. See Sig Gissler, "What Happens When Gannett Takes Over," *Columbia Journalism Review,* November-December, 1997, 42-45 as cited in Alger,170-171.

[46] James Rainey and Thomas S. Mulligan, "Tribune Defends Its Ownership of the Times," *Los Angeles Times/latimes.com,* (http://www.latimes.com/business/la-fi-tribune19sep19,1,235917,full.story?coll=la-headlines-business), September 19, 2006. See also: Katherine Q. Seelye, "Los Angeles Times Publisher Is Ousted," *The New York Times/nytimes.com*, (http://www.nytimes.com/2006/10/06/business/media/06paper.html?), October 6, 2006.

Knight Ridder newspaper chain to McClatchy Newspapers is also resulting in layoffs at major city newspapers such as the *San Jose Mercury*, *The Philadelphia Inquirer* and its sister paper, *The Daily News*, following significant cuts the year before. Knight published 32 daily newspapers, with a readership of 8.5 million daily and 11 million Sundays.[47]

More than half of all TV stations surveyed by the Project on Excellence in Journalism reported budget cuts or layoffs in 2000.[48] Since 2000, the newspaper industry has so far lost about 2,800 fulltime professional newsroom jobs.[49] The Project's *State of the News Media 2004* reported that radio newsroom staffing declined by 57 percent from 1994 to 2001, and since 1985 the number of network news correspondents has declined by 35 percent while the number of stories per reporter increased by 30 percent.[50] As a result, newspapers and TV stations are cutting back on the coverage of local events, local government, and investigative reporting.[51] To cut costs, local

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[47] Katherine Q. Seelye, "3 Former Knight Ridder Newspapers Plan Layoffs and Other Staff Reductions," *The New York Times/nytimes.com,* (http://www.nytimes.com/2006/10/21/business/media/21philly.html?), October 21, 2006; Peter Carey, "Knight Ridder sold to McClatchy," *San Jose Mercury News/mercurynews.com,* (http://www.mercurynews.com/mld/mercurynews/14084153.htm?), October 21, 2006.

[48] Marion Just, Rosalind Levine and Todd Belt. "Thinner, Cheaper, Longer." Special Report: Local TV News, *Columbia Journalism Review/Project on Excellence in Journalism* (November/December 2001). 12-13.

[49] Project on Excellence in Journalism and Rick Edmonds, The Poynter Institute, "May 8, 2006 Update," *State of the News Media 2006,* (www.stateofthenewsmedia.com/2006).

[50] Bill Kovach, Tom Rosenstiel, and Amy Mitchell, "Commentary on the Survey Findings," *State of the News Media 2006,* Project on Excellence in Journalism, (www.stateofthenewsmedia.com/2006).

[51] Project on the State of the American Newspaper, Kunkel and Roberts, *Id.*; Brady, Lee Ann and Atiba Pertilla. "The Look of Local News." Special Report: Local TV News, *Columbia Journalism Review*/Project on Excellence in Journalism (November/December 2001), 11-12.

news outlets increasingly rely on stories and resources fed to them by distant corporate owners.

Further, as the highly-regarded former editor of the *Philadelphia Inquirer* Gene Roberts and the Dean of the University of Maryland College of Journalism, Thomas Kunkel, concluded after a two-year exhaustive study of the state of American journalism:

> "In the newspaper industry, consolidation—in tandem with the chains' desperation to maintain unrealistic profit levels (most of these big companies now being publicly traded)—is actually *reducing* the amount of real news being gathered and disseminated, most conspicuously at the local and state levels, where consumers need it most. This is because consolidation has resulted in far fewer news outlets, and the economic pressures have resulted in fewer reporters with fewer inches in the paper to say anything."[52]

Similarly, in their comments to the Commission on cross-ownership, Mid-West Family Stations ("Mid-West"), a group of related companies which operate 37 radio stations in 20 Midwestern communities, provided an example of how radio/newspaper cross-ownership "simply serve(s) as a cross-promotional vehicle rather than as an independent editorial voice." It also provides an example of how media concentration at the local level fostered by cross-ownership can compromise the local editorial process and news coverage. In Madison, WI, where three radio station group owners and their

[52] Kunkel and Roberts, 36.

affiliates account for the vast majority of the radio market, "such skewing of the editorial process is already taking place."[53]

The CWA comments reported on the Project on Excellence in Journalism, an affiliate of the Columbia University Graduate School of Journalism, which found in its survey of 118 news directors around the country that 53 percent reported that advertisers pressure them to kill negative stories or run positive ones. Similarly, the survey found that news directors believe that the wall between sales and news is getting harder to maintain, and sales are having more and more influence on newscasts. Almost one in five news directors—especially in smaller markets—say that their sponsors try to prevent them from covering stories. One quarter of news directors in small markets report that they have been pressured to censor their news. The report concluded that, "the findings and comments (in the survey) raise questions about the journalistic independence of local television news." [54]

Unions affiliated with the AFL-CIO and the DPE with members in the news and entertainment media industries provide additional evidence that localism as well as diversity do suffer as a result of media consolidation. A survey of media professionals about the impact of media consolidation on

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[53] Comments of the Mid-West Family Stations, *In the Matter of Cross-Ownership of Broadcast Stations and Newspaper; Newspaper/Radio Cross-Ownership Waiver Policy,* MM Docket No. 01-235, MM Docket No. 96-197, Dec. 3, 2001, 4. Cited in AFL-CIO 2003 Comments, 29.

[54] Marion Just and Rosalind Levine, "News For Sale." Special Report: Local TV News, *Columbia Journalism Review/Project on Excellence in Journalism* (November/December 2001), 2-3. Cited in CWA 2003 Comments, 31.

their professions, conducted by Laurer Research, Inc., indicates that media workers observe shifts in coverage away from news and public affairs coverage. For example, media workers surveyed reported a huge increase (67%) in entertainment at their local news operation. Surveyed workers also expressed concern about changes in particular types of coverage, resulting in less diversity of opinion (69%), less public policy (67%) and fewer meaningful stories (65%) being covered.[55]

In addition, in response to questions about the effects of the current level of consolidation on the media workplace and media coverage, media workers agree that understaffing (73%) is undermining the quality of news coverage at their organization. They are also highly concerned about a lack of time and resources to do a professional job (68% adversely affected). A majority (50%) notes the detrimental effect of the shrinking volume of news content (50%).[56]

News reports daily underscore the urgency of these concerns. On October 19, 2006 Associated Press reported NBC Universal was going to "streamline its news operations." NBC planned to combine its cable news channel MSNBC with facilities in New York and New Jersey, and its Spanish-language broadcaster Telemundo with other facilities in California.

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[55] Laurer Research, Inc. "Media Professionals and Their Industry, A Survey of Workers and their Attitudes Abour: The State of Journalism and Broadcast News; The Impact of Media Consolidation on Their Profession; The Likely Consequences of Further Media Concentration Under New FCC Rules." Presentation at FCC Public Hearing on Media Ownership, Los Angeles, CA, October 3, 2006, 7, Chart 7.
[56] Laurer Research, 6, Chart 5.

According to AP, NBC will cut will cut 700 jobs, 5 percent of its workforce: "NBC's cost-saving plan involves laying off people from the company's 11 news divisions including on-air talent."

Members of the American Federation of Television and Radio Artists (AFTRA) were recently asked their views on how FCC's media ownership rules affect their professional work life. AFTRA represents a wide spectrum of workers in the media and entertainment industries. Its members include performers, broadcasters, and recording artists. AFTRA president John Connolly reported on the findings in his testimony to the FCC at its hearing on media ownership in Los Angeles, on October 3, 2006.[57] In their responses, news reporters and anchors said that consolidation leads to an ever-increasing "dumbing down" of the news, and pressure to recycle and reuse material, rather than look for new and relevant local stories to report. Similarly, recording artists complained that opportunities for airplay were severely reduced if not destroyed by homogenization of radio formats and fewer independent stations with local content. Radio announcers claimed that consolidation has resulted in catastrophic job loss and salary compression because when hundreds of stations are commonly owned, the most cost-effective way to program those stations is by voice-tracking or automating.

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[57] "Testimony of AFTRA National President John Connolly Before the Federal Communications Commission," Public Hearing on Media Ownership, Los Angeles, California, October 3, 2006

Members of Writers Guild of America, East also have reported many examples of lowering news quality and local coverage as a result of media consolidation. At a FCC hearing in Austin, Texas in September 2006, the Guild's assistant executive director, Ann Toback testified that:

> "For years our newswriters and producers have voiced their concerns over management cuts to their newsroom resources. They have raised the alarm as news network management have eliminated entire departments of in-house researchers and librarians, leaving no one but the writers or in some instances, graphic artists, to fact-check stories. They have fought across-the-board cuts to newsroom staffing, which have resulted in far fewer people writing and producing newscasts. And in every instance, the cutbacks have most affected local news coverage; instead of broadcasting well-researched news stories important to the community, short-staffed newsrooms are resorting to filling airtime with news stories ripped from wires, and the wire stories tend to be national and entertainment-based."[58]

One of the most striking examples exists in Los Angeles, which has one television triopoly and three duopolies; it is a poster-child for media consolidation. In Los Angeles, CBS first created a duopoly of KCAL and KCBS-TV news stations and in January of 2005, CBS combined the two local news outlets into one newsroom. Toback reported that before "combining the KCAL and KCBS newsrooms, CBS promised the community and its news staff that they would maintain two very separate newscasts reflecting two community news outlets. CBS promised to protect the news quality and local news coverage. Unfortunately, CBS has not kept these promises."[59] Immediate cuts were made in the KCAL/KCBS staff and there were

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[58] Ann Toback, Writers Guild of America, East, "Address to FCC Hearing," Austin, Texas, September 17, 2006.
[59] *Id.*

significant, immediate impacts on newscasts. The community affairs department was cut back, and now only one person on staff remains to serve the purpose of two entire community-based departments. As a result of the merger, the Special Investigative Unit was eliminated. This unit investigated local issues, and it was noted for producing a story that led to the establishment of new standards for health department inspection of LA restaurants. CBS further eroded its newscasts 19 months after the merger by eliminating 57 newswriter/producer shifts a week from their schedule. KCAL/KCBS writers complain that they are now so short-staffed that there is little if any time to research stories.[60]

James C. Joyce, Vice President of the National Association of Broadcast Employees & Technicians (NABET)—Communications Workers of America, told a similar story in his testimony at the FCC hearing in Los Angeles.[61] NABET represents 10,000 broadcast professionals at local and network TV and radio stations. Many of its members are employed in major Los Angeles television stations that have been subject to consolidation. He noted that NBC owns three television stations in the Los Angeles market, including KNBC and two Spanish-language stations KWHY and KVEA. NBC acquired the Spanish-language stations when it purchased Telemundo, and within a year, it merged the stations into one facility in Burbank, combining

[60] *Id.*
[61] "Remarks of James C. Joyce, Vice President, National Assocation of Broadcast Employees & Technicians—Communications Workers of America," FCC Public Hearing on Media Ownership, Los Angeles, CA, October 3, 2006.

technical operations, sales and marketing and newsrooms. As a result, ten percent of the workforce lost their jobs, mostly Spanish-speaking employees from Telemundo. The consolidation has extended into nearby markets. For example, KWHY-TV retransmits its programming to San Diego and Santa Barbara.

Before NBC bought Telemundo, Joyce observed, the stations were competitors and each had a separate news operation. Now the news operations are commingled, with two assignment editors, one for English-language KNBC and the other for the Spanish-language stations. They coordinate coverage, and send one crew to shoot video for all three stations, and the two Spanish-language stations often use the same reporter who carries a four-sided microphone. NBC is now taking consolidation one step further. It is creating a "SuperDesk" to merge the assignment desks of KNBC, KVEA, KWHY, the NBC Network, and possibly CNBC and MSNBC. Joyce further noted that Viacom-CBS owned KCAL-channel 9 and KCBS-channel 2 also extensively commingle, sharing reporters and often airing the same news story. "While these changes may be more 'efficient,'" he concludes, "they do not advance the goals of competition, diversity, and localism. This is not good for democracy,"[62]

These testimonies provide empirical and anecdotal evidence that suggest that consolidation can be damaging for the quality and quantity of local news media, contrary to the Commission's earlier findings that the

[62] *Id.*

Third Circuit has accepted. However, recently revealed FCC studies of the relationship between media market structure and localism and diversity justify reconsideration by the Commission of the impact on localism of increased concentration and cross media mergers in its new rulemakings. A series of detailed economic analyses shows that more concentrated markets provide less local news and less diversity in the news, and that conglomeration reduces the amount of local news. "In short," Cooper concludes in his testimony at the same FCC hearing in Los Angeles, "cross media mergers undermine the unique goals that the Commission is charged with achieving under the Communications Act."[63]

♦ *Media ownership concentration diminishes localism and diversity in musical programming.* The Commission has previously affirmed the goal of ensuring that broadcast stations are responsive to the unique interests and needs of local communities. In its *2004 Notice of Inquiry*[64] ("*2004 Notice*") the Commission sought comments as to whether and how broadcast stations are fulfilling their core obligations to serve the interests and needs of local communities and what measures it should take to ensure that broadcast stations operate to promote localism. In their filings in

[63] See Cooper "The Impact of Lifting," (2006), 19. The FCC reports are: Anonymous, *Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News* (Federal Communications Commission, draft dated June 17, 2004); Alexander, Peter J. and Brendan M/Cunningham, "Diversity in Broadcast Television: An Empirical Study of Local News," *International Journal of Media Management* 6:177.
[64] Federal Communications Commission, *Notice of Inquiry On the Matter of Broadcast Localism,* MB Docket No. 04-233, adopted June 7, 2004.

response to this notice and elsewhere, AFL-CIO and DPE affiliates in the broadcast and music industries have provided compelling testimony and evidence that both diversity and localism in music programming have been diminishing, largely as a result of ownership deregulation, particularly in the radio industry. As Thomas F. Lee, president of the American Federation of Musicians of the United States and Canada (AFM), said in testimony submitted to the U.S. Senate Committee on Commerce, Science & Transportation:

> "The unfortunate fact is that radio deregulation has not fostered innovation, competition or programming diversity. Instead it has reduced the number of radio station owners across the nation and in each geographical market. And, it has enabled those stations to flood the airwaves with the same few "hit" songs that are well-funded and heavily marketed. What gets off the airwaves is everything else—music that is varied, innovative, independent, less well-funded or local. There is almost no place left on the radio dial for jazz musicians, symphony orchestra musiciasn, local acts, and the wide range of diverse music that falls outside the "boxes" established by centralized playlists. This hurts our members artistically and economically—and it also hurts the American public by depriving it of rich and varied musical offerings."[65]

Similarly, in their reply comments filed in the 2004 localism proceedings, the AFM, AFTRA, the Future of Music Coalition, and others noted that promoting localism requires "that broadcast stations reflect and create opportunities for local artists and create avenues for other forms of local self-

[65] Thomas F. Lee, Testimony before the U.S. Senate Committee on Commerce, Science & Transportation, Hearing on Ownership in the Radio Industry, January 30, 2003.

expression."[66] "Preserving localism," they stressed, "requires that stations be programmed locally, meaning that the content of the material being played or aired should be chosen by individuals that have recognizable connections in that community."[67]

However, they observed, numerous presentations at the Commission's Localism Task Force hearings, as well as the comments filed in response to the *2004 Notice*, provided substantial evidence that "the market forces created by the current, overwhelmingly consolidated broadcast media industry simply fail to provide the necessary incentives to promote these aspects of localism. Indeed, the market forces driving the broadcast industry today instead promote the opposite—centralized, homogenized, and uniform programming conceptualized and operated without the input or participation of individuals who live in the local communities to be served."[68]

Two of the most troubling practices enabled by the concentration of radio ownership, which have been undermining musical diversity and localism, are the use of national or regional "playlists" and "voice-tracking." A national or regional "playlist" refers to a uniform list of songs played on local radio stations as mandated by station group owners. Corporate managements and consultants compile and maintain these playlists with

[66] Reply Comments of the American Federation of Musicians, American Federation of Television and Radio Artists, Future of Music Coalition, The Recording Academy, Recording Artists' Coalition, *In the Matter of Broadcast Localism,* MB Docket No. 04-233. Filed with the FCC January 3, 2005. ("AFM et al Reply")
[67] *Id.,* 5.
[68] *Id.,* 4.

minimal input or participation by local station staff or local communities. As a result, these centrally mandated playlists take away local stations' ability to discover and promote new local artists, who consequently do not have the opportunity to gain airplay or wider exposure. The result is a loss of diversity and diminishment of the types of music heard on the radio and embraced by the public.[69]

"Voice-tracking" refers to a technology used by Clear Channel, the largest group owner of radio stations in the United States, which replaces live and local broadcasts with pre-recorded airshifts in remote locations. Announcers pre-record liners and announcements, and later splice in the music. These programs are subsequently aired several days or even weeks later in cities and towns far away from where the airshift was recorded as "local programming." As reported in AFTRA's and AFM's comments to the 2004 localism proceedings, "the practice has evolved into a crass form of cost cutting that simply eliminates live local broadcasts altogether, depriving local communities of local talent and responsive local programming."[70] Moreover, those comments add, that voice tracking does not import big name talent into smaller markets, as Clear Channel asserts, but rather it imports cheaper announcers from smaller markets into larger markets, including all of the top three markets at one time or another.

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[69] Comments of the American Federation of Television and Radio Artists and the American Federation of Musicians, *In the Matter of Broadcast Localism,* MB Docket 04-233. Filed with the FCC November 1, 2004, 17. ("AFTRA/AFM 2004Comments").
[70] *Id.,* 15.

The AFTRA/AFM 2004 Comments document several troubling consequences of voice-tracking. For example, in addition to the impact on coverage of local news and a station's ability to provide timely and accurate emergency response coverage, voice-tracking has cost the loss of hundreds of disc jockey and announcer jobs at stations nationwide. Indeed, consolidation has resulted in the large-scale loss of media talent in communities. One radio executive has estimated that over 10,000 radio industry jobs have been lost since the passage of the 1996 Telecommunications Act.[71] One consequence is that in many communities today, there are stations completely with voice-tracked or automated material with no local personnel at all. "The end result," the AFTRA/AFM 2004 Comments conclude, "is undeniable—no local flavor, no local input, no local jobs, no local coverage and no local connection. It is axiomatic that these practices do not serve local communities."[72]

The loss of local control over musical formats and programming has all but eliminated the traditional avenues by which local radio stations and local disc jockeys fostered local artist development and the growth of unique local musical genres by gauging and responding to community tastes, trends and novelties. Local markets historically were the steppingstone for successful local artists to "break" into the national scene. Most of the distinctive "American" musical sounds actually began as local and regional sound, such

[71] See Salon.com, "One Big Happy Channel?" Eric Boelart, June 28, 2001 (http://www.archive.salon.com/tech/feature/2001/06/28/telecom_dereg/index.htm).
[72] AFTRA/AFM 2004 Comments, 16.

as New Orleans jazz, the Detroit sound, the Philly sound, "Tejano" music, Seattle "grunge" and "East Coast" and "West Coast" rap and hip hop. The continued erosion of local musical media markets as a result of consolidation, therefore, ultimately diminishes the richness of American musical culture.[73]

♦ ***Substitutability has been shown to be very limited between media types (television, radio, newspaper, cable, Internet), and not a valid justification for weakening media ownership rules.*** Proponents of weakening media ownership restrictions have argued that there is now a proliferation of other media sources of news, such as cable and the Internet, that different media news sources are substitutable, and that because there has been a proliferation of media outlets (especially radio and television stations), restrictions that limit ownership of media outlets can safely be relaxed without damaging viewpoint diversity, localism and competition in media markets. The discussion above on declining numbers of owners across the three primary media types (television, radio, newspapers) as well as news operations, based on the empirical work of Consumer Federation of America research director Mark Cooper, should be sufficient to discount the outlet proliferation argument.

At the same time, the AFL-CIO in its earlier comments to the FCC outlined the substantial evidence that indicates that there is weak substitutability of media sources of news, especially at the local level. The

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[73] *Id.,* 18.

evidence shows that, notwithstanding the development of new outlet technologies, including cable, DBS, and the Internet, ownership concentration over all media is growing, the rate of growth of media outlets is slowing, and where there is a loss of an outlet or voice, particularly in news, the public does not substitute for the loss with another outlet, but, instead, consumes less news overall.

The AFL-CIO and DPE affiliate CWA in its comments also presented similar arguments with evidence that effectively counters the substitutability argument. For example, the CWA cited two Commission-sponsored studies, one by Joel Waldfogel on consumer use of the media and the other by Anthony Bush on how advertisers use different types of media. It argued that these studies show that there is no one large local media market—rather, there are separate and distinct newspaper, radio, and broadcast markets.[74] Other citizen petitioners also presented evidence in support of the weak substitutability position.

More recently, writing in the Consumer Federation of America/Consumer Union petition to the FCC, Cooper challenges claims about substitution between media. "This claim is contradicted by its own data and analysis in other parts of the order. In each of the competition analyses the evidence on competition in advertising media markets indicates that the

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[74] See: Joel Waldfogel, , "Consumer Substitution Among Media," FCC MOWG Study #3, Sept. 2002, Part II Table 1, 63 ("Waldfogel"). The data is from Scarborough Research 1999-2000 consumer survey of 180,000 people in the top 66 media markets; C. Anthony Bush, "On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales," FCC MOWG Study #10, Sept. 2002. Cited in CWA 2003 Comments, ii, 6, 14.

different media are separate products." The FCC, in contrast, claims that evidence on media use for diversity purposes in the marketplace of ideas indicates there is only one large market. Cooper argues that the econometric evidence in the record supports an opposite conclusion: "Substitutability between media for advertising purposes, although not great, is much larger than the substitutability of the media for usage purposes."[75]

The Commission in the *2002 Order* appeared to accept part of this argument, and excluded cable in the design of its "Diversity Index," because, as the Third Circuit in *Prometheus* notes, there are serious doubts as "to the extent that cable provided independent local news—the Commission's recognized indicator of viewpoint diversity in local markets."[76] The Commission, however, did not exclude the Internet as a source of viewpoint diversity. The Third Circuit in *Prometheus*, however, disagreed with the Commission on this point. *Prometheus* importantly observes that "media outlets have an entirely different character from individual or organizations' websites and thus contribute to viewpoint diversity in an entirely different way. They provide an aggregator function (bringing news/information to one place) as well as a distillation function (making a judgment as to what is interesting, important, entertaining, etc.)."[77]

The Third Circuit also criticized the Commission's attempt to justify different treatment for the cable and the Internet, suggesting that local cable

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[75] CFA/CU Petition 2003, 19.
[76] *Prometheus*, 62.
[77] *Prometheus*, 67

news channels are only available in select markets, while the Internet is available everywhere. Noting that even the Commission has acknowledged that almost 30 percent of Americans do not have Internet access, the court concluded that, "Not only is this distinction demonstrably false . . . it is irrelevant. That the Internet is more available than cable news channels does not mean that it is providing independent local news." Finally, on remand, the Third Circuit required that the Commission "either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable."[78]

The AFL-CIO and the DPE commend the Third Circuit's decision to discount the Internet as an independent news source in consideration of media ownership limits, just as the Commission had disallowed cable in the same calculations. In its reconsideration of how it measures viewpoint diversity, therefore, substitutability between media type, including substitution of Internet or cable sources for traditional news sources, should no longer be a consideration.

III. THE ORIGINAL OWNERSHIP RULES SHOULD BE MAINTAINED AND STRENGTHENED

Below the AFL-CIO and the DPE review five of the six rules currently under consideration in the consolidated rulemaking, and demonstrate why these rules continue to be an essential tool for ensuring diversity, localism

[78] *Prometheus*, 68.

and competition in local and national media markets.   In the discussions on the individual rules, portions of the AFL-CIO comments filed in the newspaper-broadcast cross-ownership proceedings[79] and in the media consolidation[80] proceedings are incorporated into the record in the current proceeding. Based on this review, the AFL-CIO and the DPE strongly urge the Commission to maintain the remaining broadcast ownership rules.

A. Local Television Ownership Limit

The current rule on local television ownership specifies that a single entity may own two television stations in same local market—form a duopoly—if (1) Grade “”B” contours of stations do not overlap, or (2) at least one of the stations in the combination is not ranked in the top four stations in terms of audience share and at least eight independently owned and operating commercial or non-commercial full-power broadcast TV stations would remain in the market after the merger. The *2002 Order* revised the rule, permitting an entity to own up to two television stations in markets with 17 or fewer television stations, and up to three television stations in markets with 18 or more television stations. The Third Circuit Court remanded that decision, and the Commission wants comment on whether it should revise the number that can be commonly owned or whether additional evidence or analysis exists that would justify the limits adopted in 2003.

When media owners acquire additional properties in a local

[79] See AFL-CIO 2001 Comments; AFL-CIO 2002 Reply.
[80] See AFL-CIO 2003 Comments.

marketplace they are seeking to achieve so-called "synergies" in the marketplace. In practice, that means reducing operating expenses through combining news operations or local station staff to produce one newscast or news product for all their properties in a market. Too often, however, this results in multiple, previously independent media outlets of a community receiving news and public affairs programming from *one* assignment desk, under the management of *one* general manager, *one* news or program director, and essentially, *one* overall editorial viewpoint. In a significant number of instances, the stations are operating out of the same physical facility, but even where stations are left in different facilities, the experience of the professionals working at these stations is that local talent is terminated and all properties are brought under the same management and supervision.

Examples of the loss of newscasts or the sharing of news product among various media properties in a local market as a result of media consolidation abound nationwide. Examples of the adverse impacts of synergies created by consolidation in the Los Angeles media market were mentioned above by NABET vice president Joyce and Writers Guild East assistant executive director Ann Toback. Other examples in nationwide television were presented in AFL-CIO's earlier comments. In one notable case, in Dayton, Ohio, the general manager of WKEF-TV and WRGT-TV, an NBC affiliate and a Fox affiliate, respectively, both owned by Sinclair

Broadcasting Co., announced that both stations would eliminate locally produced weekend weather reports. Instead of weekend weather reports that originate in Dayton, both stations planned to air weather reports from a weather center at Sinclair's home office in Baltimore. Sinclair is already broadcasting weather reports in Flint, Michigan that are produced at the company's Baltimore headquarters. In Dayton, diversity suffers because Sinclair provides the same content on its two television stations. Consolidation has eroded localism in Dayton and Flint, as well, in that Sinclair is no longer producing weather reports locally, when the local nature of weather reporting is plainly of interest to the local community.

Another way that ownership concentration has stifled diversity and localism in the delivery of news is when local stations are acquired by media conglomerates, the decision-making power and control over news gathering and reporting are taken away from local station representatives and concentrated in the hands of corporate managers located in the largest cities. Although media companies may claim that they do not exert control over news decisions in the local markets, this is not borne out by actual experience. Unions representing the professionals who work at local broadcast stations report that local contract negotiations are generally conducted by corporate, rather than local station representatives. Further, local general managers will receive specific mandates regarding the types of stories to be investigated and reported. Indeed, there are several examples of local stories being "killed" because they dealt with topics that corporate management did not want to see reported.

Given the high levels of concentration in most local television markets, the Commission should maintain or tighten the restrictions on consolidation of local television stations in its new rulemaking. The 2002 Order greatly relaxed these restrictions, but the Third Circuit Court recognized that the broadcast ownership rules were based on faulty assumptions about the way to measure concentration of markets. As Mark Cooper notes in the Consumer Federation of America/Consumer Union petition to the FCC in 2003, the broadcast ownership rules were based on "radical assumptions" about the way to measure concentration levels that were never revealed to the public prior to the final rulemaking. There was no notice or discussion of TV-TV mergers that provided analyses of tripolies—a single entity allowed to own three licenses in a market—and the final rule was never subject to public scrutiny or comment.[81]

B. Local Radio Ownership Limit

The current rule accepts the numerical caps set by Congress in 1996. This is a sliding scale that increases with the size of a local market: one entity may own (a) up to 5 commercial radio stations, not more than three of which are in same service (i.e., AM or FM), in a market with 14 or fewer radio stations; (b) up to six commercial radio stations, not more than four of which

[81] CFA/CU Petition 2003, i.

are in the same service, in a market with between 15 and 29 radio stations; (c) up to seven commercial radio stations, not more than 4 of which are in same service in a radio market of between 30 and 44 stations; and (d) up to eight commercial radio stations in a radio market of 45 or more stations. The Third Circuit remanded the Commission's decision to retain these caps. The Commission now calls for comment on whether the limits should be revised or retained.

It is undisputed that the elimination of the national radio ownership cap and the loosening of the local radio station ownership limits have resulted in massive consolidation of radio properties nationwide, and a concurrent slowing in the rate of growth of stations in local markets. Evidence shows that consolidation in local radio markets can hurt news diversity, localism and quality just as it can in television markets or in cross-ownership between TV and newspapers and TV-radio. For example, in Kansas City, Entercom is using the newspersons at one of its radio stations, KMBZ-AM to provide news reports on the other eight stations it owns in that market. Prior to the loosening of the ownership caps, separate and distinct news programs were produced for WDAF-AM and KUDL-FM. These programs no longer exist, and accordingly, there is less diversity in news programming in the Kansas City market.

In Chicago, Westinghouse-owned WMAQ-AM had been an all-news station since 1989. Westinghouse bought CBS and later merged with Viacom in the 1990s. The merged company's radio division, Infinity (now CBS Radio), also owns the all-news format station WBBM-AM. (Viacom spun off CBS Corporation including its broadcast properties at the end of 2005.) In 2000, Viacom/CBS/Infinity determined that it was no longer profitable for it to compete against itself, so it shut down WMAQ-AM. Because WMAQ-AM and WBBM-AM were the only all-news format stations in Chicago, this left Chicago with only one all-news radio station. Though some news may be available on other radio stations to a lesser degree, many of these remaining stations in Chicago are owned by CBS Radio, or receive news-reports from Shadow and/or Metro Networks, reporting services owned by Westwood One, also part of the CBS Corporation conglomerate.

As argued earlier in these comments, consolidation of radio ownership since deregulation of the industry in the 1996 Telecommunications Act—the most notable example being Clear Channel, which has been the most aggressive in buying up radio properties—has also diminished musical diversity and localism by encouraging practices such as playlists and voice-tracking. As a result, musicians have diminished ability to garner significant commercial airplay as ultimate decision-making has moved away from a relatively diverse group of locally-based programmers and DJs who are responsive to their communities in favor of large national or regional decision-making. Moreover, there is less media exposure for unique radio formats such as jazz, classical, Tejano or bluegrass because they are deemed less commercially viable, despite their importance to the preservation of American musical culture.[82]

Studies also demonstrate that the massive consolidation in the radio industry over the past six years has resulted in a sharp *decrease* in the diversity of music available in local communities, to the detriment of the radio and sound recordings industries. On November 15, 2003, the Future of Music Coalition (FMC) released a study that tracked the actual songs played by stations nationwide. The data from this study reveal that, "there was considerable format homogeneity—playlist overlap between supposedly distinct formats [by] as much as 76 percent."[83]

Moreover, the FMC study reported significant listener dissatisfaction with the content on radio. In its survey of 500 listeners nationwide, the FMC found that 80 percent of listeners wanted less repetition in songs, longer playlists and supported efforts to limit media consolidation. Over 67 percent of these respondents supported Congressional action to address the new "payola" systems whereby radio conglomerates pay fees to mid-level "promoters" (often owned and/or controlled by the conglomerates) to control the music played by local stations.[84] Data collected by G.Williams and S. Roberts in a FCC-sponsored study in the 2002 media consolidation

[82] AFM et al 2005 Reply, 8.
[83] Peter DiCola and Kristin Thompson, "Radio Deregulation: Has it Served Citizens and Musicians?" November 18, 2002 (http://www.futureofmusic.org/images/FMCradiostudy.pdf), p. 57
[84] *Id.,* 68-90.

proceedings[85] were not inconsistent with the FMC report. For example, Williams and Roberts reported that the increase in ownership concentration had resulted in a *decrease* in the diversity of formats nationwide. Consistent with the FMC's finding of listener dissatisfaction, Williams and Roberts also documented a decline of almost 1 percent annually in overall radio listenership nationwide.[86]

Media consolidation also has created conditions that enables if not encourages questionable practices, such as pay-for-play and payola. Clear Channel, in particular, has been the subject of a number of lawsuits and regulatory and Congressional inquiries for business practices that have been made possible by its massive concentration. In the overly-consolidated broadcast marketplace media owners are in a unique position to obtain payments and other forms of consideration, both direct and indirect, in exchange for giving airplay to artists. AFTRA/AFM 2004 Comments identify three types of "pay for play" practices which are well-known and widespread in markets of all sizes nationwide: requiring sound recording artists to contact and pay a so-called "independent promoter" to promote their records to specific stations; pressuring sound recording artists to provide indirect compensation to station owners, in the form of compelled performances; and, pressuring artists to hire concert promoters associated with licensees. "These practices" they argue, "have arisen because of the dominant market power of

[85] G. Williams and S. Roberts, "Radio Industry Review: Trends in Ownership, Format, and Finance," FCC MOWG Study #11, Sept. 2002.
[86] *Id.*

group station owners," who own thousands of stations nationwide. The market power of these market players is overwhelming, and as a result—whether unintentional or by design—the modern broadcast licensee is able to create and benefit from de facto "pay for play" arrangements at the expense of artists and the public interest."[87]

The ownership rules have historically guarded against the harms that have been generated as a result of conglomeration in our media industries. Further slackening of the regulatory controls in the radio industry would violate the Commission's duty and mandate to protect the public interest.

C. Media Cross-Ownership Ban

The current rule on broadcast-newspaper cross-ownership prohibits common ownership of a full-service broadcast station (TV or radio) and a daily newspaper if the station's service area completely encompasses the newspaper's city of publication. The current rule on TV-radio cross-ownership allows an entity to own one TV station (or two, in a market large enough to trigger the "duopoly" provisions of the local television rule) and a varying number or radio stations in a local market, depending on number of independently owned media "voices" that are left.

The *2002 Order* greatly relaxed the rule that limited broadcast-newspaper cross-ownership and the radio/TV cross-ownership restriction by replacing both regulations with a set of "cross-media" limits tiered according

[87] AFTRA/AFM 2004 Comments, 21-23.

to the size of the local market: (a) in those with 3 or fewer TV stations, all newspaper/broadcast and radio/television combinations were prohibited; (b) with 4-8 stations, an entity can own combination including a newspaper and either (i) one television station and up to 50 percent of the radio stations that may be commonly owned under the applicable radio cap, or (ii) up to 100 percent of radio stations allowed under the applicable radio cap; and (c) in markets with 9 or more television stations, cross-media combinations permitted without limit as long as they complied with applicable local television and local radio caps.

The Third Circuit Court remanded the decision on specific numerical caps, but agreed with Commission that a flat ban on newspaper/broadcast combinations was no longer necessary. The Commission requests comments on how it should approach both cross-ownership restrictions now, including input on whether the differences between television and radio broadcast operations are significant in context of common ownership with a newspaper. The discussion below examines only on the broadcast-newspaper cross-ownership limits, though the recommendations that the Commission maintain strong limits on cross-ownership limits based on an appropriate methodology for measurement of ownership concentration will apply to both broadcast-newspaper and TV-radio combinations.

A structural rule that bars common ownership of a newspaper and television station in the same market is as important today as it was in 1975 when the rule was first adopted. As the Commission states in the *NPRM* for the media consolidation proceeding, the purpose of its local ownership rules, including the newspaper/broadcast cross-ownership rule, is to "foster competition and diversity in the local media marketplace."[88] As the Supreme Court noted in its 1978 decision upholding the newspaper/broadcast cross-ownership rule, "it is unrealistic to expect true diversity from a commonly-owned station-newspaper combination. The divergence in their viewpoints cannot be expected to be the same as if they were antagonistically run."[89] Most recently, in the *Sinclair* decision, the U.S. Court of Appeals upheld the Commission's judgment that common ownership reduces diversity.[90]

As was true fifty years ago, most Americans still get their local news and information from their daily newspaper and one of a handful of broadcast television stations. As an FCC-sponsored study by Joel Waldfogel reports,[91] more than 60 percent of Americans watch network and local news on broadcast television and about 62 percent of Americans read a daily newspaper.[92] Newspapers and television newscasts serve a unique role for the American public. Newspapers provide in-depth reporting and analysis and they are the only media whose primary focus is news, not entertainment. Television dominates in political news and political advertising, provides

[88] *NPRM* ¶8.
[89] *NCCB*.
[90] *Sinclair Broadcasting Group v FCC,* 284 F.3d 148, 161 (D.C. Circuit 2002) (*"Sinclair").*
[91] Waldfogel MOWG Study #3.
[92] *Id.,* Tables II3 (television news) and I1 (newspaper). This data is based on survey data collected by Scarborough Research, 1999-2000 on media usage of 180,000 respondents in 66 large markets.

breaking news, and fconveys the immediacy and emotional impact of its visual images. No other medium compares in audience reach or advertising dollars.

Preserving the prohibition against the common ownership of newspapers and television stations in local markets is critical for maintaining diversity in the delivery of local news and programming to the public not only because of the uniquely important role these media outlets play in the delivery of news to the public as discussed above, but because there are already few voices in local markets for these outlets and, as shown, the public does not receive diverse viewpoints through other media.

The available empirical data shows that citizens in most local communities already have very limited access to newspapers and broadcast television stations in local markets. The data in the newspaper/broadcast cross-ownership proceeding reveals how concentrated the ownership of newspapers is in local markets. In 1999, there was an average of 3.11 newspapers in the nine largest metropolitan areas with more than 1 million population, an average of 1.82 newspapers in the 17 medium-sized markets with population between 500,000 to one million, and one newspaper or fewer in the remaining 1,168 communities.[93] Thus, most Americans have access to only one or two daily newspapers.

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[93] Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project, *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers;*

Similarly, most Americans have access to only three or four broadcast television newscasts. The local affiliates of NBC, CBS, ABC, and Fox are the local news broadcasters of record. As noted above, behind today's seeming plethora of television choices are seven conglomerates: Disney (which owns ABC), CBS Corporation (CBS and The CW Television Network), Viacom (BET, MTV Networks),[94] AOL Time Warner (The WB), News Corporation (Fox), and General Electric (NBC).[95] Since relaxation of television ownership limits, the number of entities owning commercial TV stations has dropped from 543 in 1995 to only 350.[96] As Cooper showed above, ownership numbers in the radio, television and newspaper markets have all declined, even as the number of radio and television outlets has increased. More significantly, in all three media markets, the number of local newsrooms has substantially declined.

In sum, the monopoly daily newspaper and a handful of television stations dominate the local media market. Further, as Waldfogel powerfully demonstrates, there is no consumer substitution between broadcast television

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Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 01-235, MM Docket No. 96-197. Filed with the FCC December 3, 2001, 86.

[94] At the very end of 2005, Viacom split off its broadcast properties in the new CBS Corporation, which included both TV and radio stations. This includes CBS, The CW (formerly UPN), CBS Paramount Television and CBS Radio (formerly Infinity) among its major properties. In effect, the new CBS Corporation is the old Viacom, while the new company with Viacom's name includes cable and satellite TV networks, BET and MTV Networks, and movie production studios Paramount and Dreamworks among its major properties.

[95] Douglas Gomery, *The FCC's Newspaper-Broadcast Cross-Ownership Rule: An Analysis,* Washington, D.C., Economic Policy Institute, February 15, 2001, 5, 9-10.

[96] *Notice of Proposed Rulemaking,* In the Matter of Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; and Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 96-197. September 20, 2001 (Rel.) ("Cross-Ownership *NPRM*").

and newspapers and no statistically significant substitution between these critically and uniquely important media and anything else.[97] Thus, there is a very real danger inherent in encouraging even fewer voices by permitting the co-ownership of newspapers and television.

As with consolidation within the television and radio markets, broadcast and newspaper owners argue that eliminating the cross-ownership ban would allow cross-owned properties to realize "synergies" that would provide greater resources to use to expand local news and information reporting. As in the television and radio markets, these "synergies" are not in the public interest because they mean reduced staff and shared news product among the different media properties in a local market.

In the new, cross-owned multi-media environment, many reporters are required to learn and do jobs outside their primary media, and joint reporting is becoming more common. Journalists and other media workers find themselves with additional burdens, as they are required to practice their craft in multimedia formats for which they have had little prior experience or training. Reporters who once worked just for television or for print, are now writing a TV story, writing a newspaper article on the same story, and producing an online version. Employees are required to do double and treble duty producing copy for the different media meeting continuous, rather than daily, deadlines. Newspaper photojournalists are being required to carry

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[97] As noted in Baker, *Democracy Unhinged,* 10.

both still and video cameras on their assignments.[98] Often the raw material for an article written by newspaper reporters goes onto websites that almost every newspaper in the country, and probably most local television stations, now own—before a final edited version appears in print.[99]

Two of the best known examples of print-broadcast media convergence are the Tribune Co.-owned *Chicago Tribune* and Chicago television station WGN among several other media properties and Media General's ownership of the *Tampa Tribune*, WFLA-TV and Tampa Bay Online. Both of these combined operations now share news product resulting in the loss of independent voices in those communities.

The problem of faulty methodology and measures used by the Commission in its 2002, applies to the Index the FCC wanted to used to establish where it would allow TV-newspapers mergers without any review. The Third Circuit Court criticized the Commission, noting that, "In converting the HHI to a measure for diversity in local markets, . . . the Commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results."[100]

Cooper similarly explains that the FCC used "a weighting scheme in the cross media analysis that underweights TV and daily newspapers and

[98] Ken Auletta, "The State of the American Newspaper." *American Journalism Review* (June 1998).

[99] Phone conversations with Linda Foley, president and Larkie Gildersleeve, director of research, The Newspaper Guild-Communications Workers of America, November 30/December 3, 2001.

[100] *Prometheus*, 58.

vastly overweights weekly newspapers, radio and the Internet. He pointed out that this produced results that were "absurd on their face."[101] The Third Circuit Court's judgment was no less harsh. It stated that the FCC's analysis was based on "inconsistent, unrealistic assumptions,"[102] which "requires us to abandon both logic and reality."[103]

Cooper summarized the problem with the Commission's proposal to define cross media limits:

> "The ban on holding a television broadcast license and ownership of a newspaper in the same market was the oldest of all the rules that the Commission proposed to change. The change it proposed was more pervasive than for any other rule. The cross media limit it proposed was not much of a limit as it would have allowed mergers to take place in over 85 percent of all markets in the country, where over 95 percent of the population resides. By underestimating the importance of newspapers, the Commission opened the door to a massive wave of cross-media mergers."[104]

Clearly, the Commission's new rulemaking on cross-ownership limits needs to be far more restrictive and based on more logical, reasonable measures than employed in the *2002 Order*. Specifically, the Commission should preserve the current bans on media ownership cross-ownership which allow waivers on a case-by-case basis. Second, if the Commission wants to establish a single cross-media rule, then it should apply the methodology

[101] CFA/CU Petition 2003.
[102] *Prometheus*, 69
[103] *Prometheus*, 70
[104] Mark Cooper, "When Law and Social Science Go Hand In Glove," Session on Localism and the News, Telecommunications Policy Research Conference, October 3, 2004, 23.

outlined by the *Prometheus* Court. It should first assign an appropriate weight for consumer use of each media for local news and information (e.g. daily and weekly newspapers, TV, radio), and then weight each media within its media type by market share (e.g. distinguishing the market shares of New York Times and the New York Daily News). In addition, it should use the Department of Justice/Federal Trade Commission Hirshman Herfindahl Index (HHI) to evaluate mergers. In a "concentrated market" (HHI greater than 1000 and less than 1800), a change of 100 points should not be allowed and no mergers should be allowed markets with a HHI greater than 1800. Although waivers should be allowed, the rule should require separate news operations if a cross-media merger is permitted.

D. Dual Network Ban

The current rule permits common ownership of multiple broadcast networks but prohibits a merger between or among “top four” networks (i.e., ABC, CBS, Fox, and NBC). This restraint was not an issue in *Prometheus* but the Commission calls for comment on whether restriction should be retained.

The weakening of the dual network rule, permitting combinations such as NBC and Paxson and Viacom (now CBS Corporation) and The CW (a combination of the former UPN, owned by CBS Corp. and WB, owned by Warner Brothers/Time-Warner), has resulted in less diversity of news programming. Further relaxing this rule will continue to result in existing independent news operations being shut down and/or shelled and replaced with re-purposed product as has been evidenced already, and any potential for new voices or diverse viewpoints from emerging independent networks will be dismissed in favor of more "cost effective" means of delivering product.

For example, in Philadelphia, where CBS Corporation (formerly Viacom) owns television stations KYW-TV (CBS) and WPSG-TV (CW) and all news radio station KYW-AM, CBS Corporation has assigned KYW-AM anchors to produce news for its CW television station rather than maintain a separate news operation for that station. Therefore, where there once existed a potential for another viewpoint to emerge in this market via the CW station, we now see news simply "re-purposed" from radio to suit television.

Similarly, in Detroit, the CBS owned and operated station (WWJ-TV) shared newscasts with the CW station in that market (WKBD-TV). When CBS determined that its local newscasts were not profitable, it left the local news business altogether. Scripps-owned WXYZ agreed to produce newscasts for the CW station at 10 p.m., and there would be one fewer newscast at 11 p.m. in the Detroit market. However the 10 p.m. newscast was cancelled in late 2004 due to poor viewership and neither WKBD nor WWJ-TV now air any local newscasts in Detroit.

Another example is what appears to be happening with NBC and Telemundo. As noted above, formerly separate news operations, produced in different languages, targeted at audiences of two different cultures, have now been combined, in one facility, under one general manager. While NBC emphasizes the value its news operation brings to Telemundo's table in terms of newsgathering technology and resources, there is considerable concern that the unique and independent voice of Telemundo will ultimately be subject to the editorial and/or synergistic interests of its parent.

Further, while the expectation for combined networks was that one network would market to the mainstream audience and the second network would be free to cater to niche or minority communities,[105] this result has not materialized. The BET network, owned by Viacom, cancelled several news related and public affairs shows, including "BET Tonight With Ed Gordon" and "Lead Story" and "Teen Summit," a youth-oriented public-affairs program. About 40 jobs were slated to be eliminated, constituting 12 percent of BET's work force.[106]

Finally, NBC owned and operated stations and NBC affiliates across the country have in the last few years begun the process of merging station operations with Paxson Television affiliates. While the company owns less than fifty percent of Paxson Television, NBC has sought to combine the local programming, sales and technical control operations of the NBC and PAX stations. In most instances, NBC has not contributed original programming, news or entertainment, to the PAX affiliate but instead rebroadcasts its NBC news product on the PAX station. Therefore, markets in which this

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105 *NPRM 2002,* ¶158, ¶160.

106 Tom Jacobs, "Trent, Ed and OJ", *TV Barn,* December 18, 2002, http://www.tvbarn.com/archives/007595.html.

relationship exists have seen another emerging network's potential for diversity of viewpoint bow to re-purposed news product and, in some cases, original news product produced by a major network station or affiliate.

The loss of independent producers resulting from the vertical integration of the broadcast networks has resulted in less diversity and innovation in entertainment programming. Since the elimination of the Financial Interest and Syndication Rules ("Fin/Syn") and other limits on network control over program production, the number of independent producers has plummeted, with networks owning and utilizing their own "in-house" production facilities for the production of a wide range of television programming.

Television programming holds a distinct and vital place in reflecting and nurturing American culture and democracy. Fifteen years ago, there were over twenty different independent producers shopping programs to the competing networks. Now, the media conglomerates that own the networks also own their own production facilities, and there are only 3 or 4 major independent television producers left.[107] As a result, the networks will distribute the programming produced by their own subsidiaries, even if inferior in quality to other available product. There is no incentive for innovative programming.

[107] See M. Einstein, "Program Diversity and the Program Selection Process on Broadcast Network Television," FCC MOWG Study # 5, Sept. 2002, Part II.

For example, the television program, "All in the Family" was rejected by certain networks as too provocative, but was eventually picked up by one courageous network and became television history, both entertaining and challenging the American public. There is little chance of the emergence of an "All in the Family" program today. The networks produce their own programs internally and distribute these for the cost value even where such programs may not be of the same quality as other programs. Ownership consolidation of television stations, both horizontally and vertically across the industry has not only damaged the quality of news programming, as discussed previously, but has also stifled innovation and diversity in entertainment television, another critically important forum for nurturing and promoting American culture and democracy.

In sum, the data available is alarming, and the Commission should not take any further steps in permitting even greater ownership consolidation by weakening or eliminating the dual network rule.

E. Minority Ownership Rules

In its 2002 Order, the Commission affirmed minority and female diversity as a policy goal to guide its ownership rules. Specifically, this refers to policies that encourage minority and female ownership of media resources.[108] In its only regulatory provision that promoted minority television station ownership, the Commission promulgated the Failed Station Solicitation Rule ("FSSR"), 47 C.F.R.

[108] 2002 Order ¶18, ¶46.

73.3555 n.7 in its review of the local television rule that Congress had required under § 202(c) of the 1996 Act. The Commission created the FSSR to alleviate concerns that its decision to allow duopolies would undermine television station ownership by minorities, by ensuring that qualified minority broadcasters had a fair chance to learn that certain financially troubled—and consequently more affordable—stations were for sale. It required a waiver applicant to provide notice of the sale to potential out-of-market buyers before it could sell the failed, failing, or unbuilt television station to an in-market buyer.[109]

In its *2002 Order*, however, the Commission repealed the FSSR, based on the spurious argument that that "the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market."[110] In agreement with strong objections raised by citizen petitioners, the *Prometheus* Court criticized the Commission for this action and its rationale, and remanded the Commission's decision to repeal FSSR, for "correction of this omission."[111] The Court noted that in the *2002 Order*, the Commission did not explain that preserving minority ownership was the purpose of the FSSR, nor did it argue that the FSSR was harmful or ineffective toward this purpose. It further stated that it failed to see the logic of the Commission's rationale,[112] and complained that by failing to mention anything about the effect this change would have on potential minority

[109] *1999 Television Rule Review*, 14 F.C.C.R. 12,903, ¶¶ 13–14, 74. Cited in *Prometheus*, 94.
[110] *2002 Order* ¶ 225
[111] *Prometheus*, 96.
[112] The Court explained: "Even if it were true that same market efficiencies will always lead to a duopoly absent unusual circumstances, it does not follow, without additional proof or explanation, that (1) marketing the station outside the market is a meaningless burden or that (2) the Commission should not retain the FSSR to make that 'circumstance' less 'unusual.'" *Prometheus*, 95, n.57.

station owners, the Commission had not provided "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[113]

Furthermore, the Court noted that although the Commission had promised in its *1999 Television Rule Review* to "expand opportunities for minorities and women to enter the broadcast industry,"[114] the FSSR was its only policy specifically aimed at fostering minority television station ownership. By repealing the FSSR , therefore, "without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission 'entirely failed to consider an important aspect of the problem,' and this amounts to arbitrary and capricious rulemaking."[115] The Court similarly observed that repealing the only regulatory provision promoting minority television station ownership, without consider the repeal's impact on minority ownership was inconsistent with "the Commission's obligation to make the broadcast spectrum available to all people 'without discrimination on the basis of race.'"[116]

In comments to the FCC in its media consolidation proceedings, filed on behalf of Diversity and Competition Supporters in 2003, the Minority Media and Telecommunications Council (MMTC) noted the "abysmal" status of minority

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[113] *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Cited in *Prometheus*, 95.
[114] *1999 Television Rule Review*, 14 F.C.C.R. 12,903, ¶ 14. Cited in *Prometheus*, 95.
[115] See *State Farm*, 463 U.S. at 43; *see also Copps Dissent*, 18 F.C.C.R. at 13,970–71 (chastising the Commission for "fail[ing] to conduct rigorous analysis of today's rules on minorities and women); *Adelstein Dissent*, 18 F.C.C.R. at 13,997 (same). In *Prometheus*, 95-96.
[116] 47 U.S.C. § 151. In *Prometheus*, 96, n.58.

broadcast ownership, in which "one-quarter of the nation's people own only approximately 1.2% of the equity in the industry most important to democracy."[117] In radio, MMTC found that though the number of minority owned radio stations had been increasing, it remained extremely low, at a little above 4 percent, and the number of minority radio owners was decreasing. In television, MMTC reported that the number of minority owned full power television had dropped from 33 to 20 in the three years since the Commission deregulated local television station ownership.[118]

The MMTC identifies both discrimination and other market entry barriers and media consolidation as the major factors impeding minority media ownership.[119] While past discrimination has left minorities with insufficient broadcast assets to form an equity base from which they can acquire more properties, consolidation can magnify this limitation. Minorities also tend not to own enough numbers of stations available to be offered to sellers in tax-free exchanges, which by far is the most desirable transaction model for sellers with large tax bases. Minority owned companies consequently are at a disadvantage compared to with other companies—which own properties that minorities might have owned but for discrimination—in raising and deploying capital in making

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[117] Initial Comments of Diversity and Competition Supporters*, In the Matter of: 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets,* MB Docket No. 02-277, MM Dockets Nos. 01-235, 01-317, 00-244, January 2, 2003 ("MMTC 2003"), 17.
[118] *Id.,*18.
[119] *Id.*, 19.

acquisitions of new properties.[120]

MMTC further describes how specific forms of consolidation have affected minority ownership. For example, it contends that the increase in television duopolies "profoundly diminished minority ownership," noting that since local television deregulation in 1999, minority television ownership has declined. At the time of the filing (2003), MMTC observed that there was only one Hispanic owned television station left.[121] Local television duopolies also have hurt minority consumers, according to MMTC. Because independent local radio news and public affairs nearly collapsed in the wake of radio deregulation in the 1980s, local minority communities had to rely on local television news and public affairs for important information. Consequently, "[a] news or public affairs department that is uninterested in covering the minority community often leaves members of that community with only one or two other broadcast outlets that might get their story told. Thus, any further reduction in the number o f independent local news and public affairs voices, particularly in medium and small markets, would profoundly disserve minority consumers."[122]

Similarly, while MMTC did not perceive media cross-ownership (whether TV/radio or newspaper/broadcast) as dangerous as television duopoly from a diversity standpoint, it "should not be allowed to proceed unless there is very close and continuing supervision of its impact on diversity, competition and minority ownership." Regarding the dual network rule, MMTC argued it would be a "monumental achievement" for a minority company to buy or start a

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[120] *Id.*, 36-37.
[121] *Id.*, 39-40.
[122] *Id.,* 41.

television network, but a rule that does not put any limits on mergers among networks would preclude this.[123] Finally, it claimed that radio consolidation "has diminished the intellectual and cultural diversity of the ownership pools and has discouraged new entrants." And, over the long run, unregulated radio consolidation is likely to force out most minority entrepreneurs and create new barriers to entry in ownership for minorities.[124]

The AFL-CIO and DPE share the concern about low minority ownership of broadcast media and how media consolidation amplifies discrimination and adds its own barriers that diminish minority ownership. The Commission's rulemakings need to take into consideration the impacts of any new ownership limits to ensure that they preserve, protect and promote minority ownership, rather than impede it. The AFL-CIO and DPE also endorse the MMTC proposals presented in its comments to the FCC, that address the barriers that impede minority ownership and promote measures that foster greater minority ownership in the future.[125]

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[123] *Id.*, 42.
[124] *Id.*, 48.
[125] *Id.,* 49-50.